

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 25, 2008

THOMAS E. BARGER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Knox County
No. 83999 Richard R. Baumgartner, Judge

No. E2007-01170-CCA-R3-PC - Filed May 19, 2008

The petitioner, Thomas E. Barger, pled guilty to two counts of robbery. He received consecutive five year sentences and was placed on probation. The petitioner argued that as a result of the ineffective assistance of counsel, he entered into a plea agreement for which he received an illegal sentence. After a hearing, the post-conviction court dismissed the petitioner's petition but ordered that a clerical error in the petitioner's judgment be corrected. The petitioner appeals the judgment of the post-conviction court. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Thomas E. Barger.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kenneth Irvine, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The facts of this case, as summarized at the petitioner's plea submission hearing, are as follows:

Officers from the Knoxville Police Department would testify that on April 29th, 1997, around 11:45 p.m., the defendant entered the Aztec Food Mart on Cedar Lane. He went in with a weapon and mace . . . demanded the clerk open the drawer and took thirty-one dollars from the clerk.

There was a videotape of the offense, and the victim, Mr. Sonny Bell, the clerk at the time, did pick Mr. Barger out of a lineup.

Then as to Count Two . . . about 2:08 a.m., there was an armed robbery at the Favorite Mart on Central Avenue Pike. When the investigator talked to the victim, Mary Hawkins, she said that she was robbed at knife point by the defendant. He asked for the money. He reached across the counter when she was slow to move and took the cash tray when she did open the register. He ran from the store, taking the cash tray with him, as well as the money that was inside.

There was a videotape of that robbery as well. And there would be further proof all these events did occur in Knox County.

At the post-conviction hearing on April 29, 1997, the petitioner testified that he had been on parole for five counts of armed robbery for sixty-two days when he committed the armed robberies detailed above. The petitioner recalled that he was apprehended and returned to prison to serve the remainder of his sentences following his parole violation. Eight years later and after lengthy plea negotiations with the state, he pled guilty to two counts of simple robbery. Thereafter, the trial court sentenced the petitioner to consecutive sentences of five years on each count, with the sentences suspended and the petitioner released on supervised probation. The petitioner asserted that he was a career offender and therefore not eligible for probation. The petitioner also asserted that despite testifying under oath at the time he entered his plea agreement, he did not know what he was agreeing to when he signed the plea agreement form.

The petitioner's trial counsel testified that he represented the petitioner for the two armed robberies which the petitioner committed while on parole. Counsel explained that after the commission of the offenses, the petitioner was returned to prison. Counsel negotiated with the state and worked out a plea agreement which permitted the petitioner to plead guilty to two counts of simple robbery rather than risk going to trial on two counts of aggravated robbery. The petitioner received a sentence of five years on each count at forty-five percent with guaranteed probation. Counsel stated that he believed this was a favorable plea agreement and sentence for the petitioner because he potentially faced up to thirty years on one count of aggravated robbery alone.

Counsel testified that he discussed the plea agreement with the petitioner before he and the petitioner signed the agreement. Counsel stated that the plea agreement indicated that the petitioner would start his probationary period after the petitioner completed the sentence he was serving when he violated his parole. Counsel further stated that the judgment, which indicated that the petitioner's probation was effective immediately, was in error.

Counsel also testified regarding the operation of the petitioner's probation agreement and current state of his incarceration as follows:

And the plea agreement said the [petitioner's] probation would start when he completed his sentence, which was, I think, 16 years. So when that sentence was over he didn't have to apply for probation, he would just get out, go on probation,

and hopefully be good for ten years and the cases would go away, which we thought was a good resolution . . . Mr. Barger apparently flattened his sentence, he was released and did report to probation. And it was like, I don't know how many days later, 30, 40, 50 days, a very short period of time, [he] picked up a new charge, a burglary . . .

Subsequently, we were able to work out a plea of only six years on that new charge concurrent with the ten. So . . . if the ten is taken back he's still got six years he's got to do anyway, and then exposure on the two [aggravated] robberies.

Based upon evidence presented at the post-conviction hearing, the post-conviction court made the following determination:

All right. This is the most unusual post-conviction case I've ever had, but this is my opinion And that is, that I have not heard anything here this morning that would rise to the level of a violation of [the petitioner's] constitutional rights.

There has not been any evidence of any ineffective assistance of counsel, any deprivation of any constitutional right that he has. The best I can determine from what I've heard here is that there was an incorrect judgment entered in the case.

What happened in my mind and in my judgment is that [the petitioner] entered into an agreement, which was actually extremely favorable to him, and that is he pled guilty to two robbery - they were actually armed robberies - and received a five year sentence when he was essentially a career offender. He got two five year sentences and agreed probation in those sentences.

. . . The worst thing that's happened is that there was an incorrect judgment entered, which I think needs to be corrected to reflect that these five year sentences, the probation sentences, should take effect five months or whatever it is, after they were - actually the judgment shows that they should have begun. So I'm going to deny his petition for post conviction relief. I'm going to direct that the judgment be corrected to reflect the agreement that was entered into during the sentence hearing. And that's it.

After the post-conviction court dismissed the petition, the petitioner timely filed his appeal.

II. ANALYSIS

The petitioner argues on appeal that the post-conviction court erred by dismissing his petition and argues specifically that as a result of receiving the ineffective assistance of counsel, he entered into a plea agreement for which he received an illegal sentence.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. §

40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Once the petitioner proves that counsel's representation fell below a reasonable standard, the petitioner must also prove prejudice. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Id.* at 697. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.* In considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronin*, 466 U.S. 648, 665 n. 38 (1984).

To summarize the procedural record in the case, it appears that the petitioner, after being released from prison for his conviction on five counts of armed robbery, committed two more armed robberies while on parole. He was returned to prison to serve some portion of his sentence for the parole violation. He later pled guilty to two counts of simple robbery for which he received ten years on probation. After completing his original term, he was released on probation, and soon after his release on probation, committed a burglary offense. He pled guilty to the burglary charge, and was sentenced to six years in confinement. He was incarcerated on that charge at the time his post-conviction hearing was held.

We note that we are unable to review the judgment forms in question because the defendant failed to include them in the appellate record. The defendant has the duty to prepare a record which conveys a fair, accurate, and complete account of what occurred as it pertains to those issues argued on appeal. *See Tenn. R. App. P. 24(b)*. Without a copy of the judgment, this court must presume that the evidence supports the findings of the post-conviction court. *See State v. Taylor*, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983); *see also State v. Jones*, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981).

Assuming *arguendo*, that there is an error in the judgment, the petitioner has not offered any proof beyond his own blanket assertion that he received an illegal sentence, and his assertion contradicts the proof in the record. Notations in the guilty plea agreement signed by the petitioner indicate that the petitioner was to be placed on probation “when [he] completes [his] current sentence - [in] June [or] July 2005.” The transcript of the guilty plea hearing indicates that the petitioner was placed on probation for his sentences and his probation was “to be supervised by the State Probation Office.” Furthermore, the testimony of petitioner’s trial counsel confirmed that the intent of the parties was that the petitioner’s probationary sentence would not begin until he completed his then-existing sentence. After an evidentiary hearing, the post-conviction court concluded that there was a clerical error in the judgment form. We also note that regardless of how the judgment reads, Tennessee Rule of Criminal Procedure 32(c)(3)(A) states:

When a [petitioner] is convicted of multiple offenses from one trial or when the [petitioner] has additional sentences not yet fully served as the result of convictions in the same or other courts and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply: (A) to a sentence for a felony committed while on parole for a felony.

Therefore, we conclude that the petitioner’s argument that he received an illegal sentence is without merit and he is not entitled to relief as to this issue.

In addition, the petitioner has failed to demonstrate that counsel’s representation was not within the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. As a result, the petitioner has failed to prove that he was prejudiced or that there was any resulting prejudice which would have resulted in a different outcome. *See Strickland*, 466 U.S. at 694. Therefore, the petitioner’s argument regarding ineffective assistance of counsel is without merit and he is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgment of the post-conviction court.

J.C. McLIN, JUDGE